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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

3118, LLC,

Plaintiff and Appellant,

v.

CBD INVESTMENT, INC. et al,

Defendants and Respondents.

B234706

(Los Angeles County
Super. Ct. No. BC459909)

APPEAL from an order of the Superior Court of Los Angeles County, John Shepard Wiley, Jr., Judge. Affirmed in part; reversed in part.

Sanford M. Ehrmann for Plaintiff and Appellant.

Carlson Law Group, Mark C. Carlson and Warren K. Miller; Sedgwick and Douglas J. Collodel for Defendants and Respondents.

I. INTRODUCTION

Plaintiff, 3118, LLC, appeals from an order denying its motion to compel arbitration and to stay litigation of various claims against defendants: CBD Investment, Inc., doing business as Coldwell Banker Dynasty; Richon Phan, also known as David Phan; and Hoe Le Phanlam also known as Holly Phan. The dispute arose out of plaintiff's purchase of a commercial building from Hanh Ngon Phan and Di Phung Phan.¹ Defendants represented plaintiffs and defendants in the building sale. Plaintiffs sought the orders under review after successfully obtaining an arbitration order against the Phans in a separate action. We affirm the order denying the petition to compel arbitration. But, we reverse the order refusing to stay the judicial action against the brokers pending arbitration.

II. PROCEDURAL HISTORY

A. The Seller/Broker Actions

The controversy arose from the sale of the building located at 3119 North Main Street, in Los Angeles on May 3, 2007. In a related action entitled *Kolker v. Phan* (Super. L.A. County, No. BS129829) plaintiff sued Di and Hahn. On February 28, 2011, plaintiff's petition to compel arbitration of controversies against Di and Hahn was granted.

On April 19, 2011, plaintiff filed the current action against defendants. Plaintiff sought damages on negligence and misrepresentation theories. The complaint alleged the following. Defendants are licensed real estate brokers. Defendants represented both plaintiffs and the sellers, Di and Hahn, in the transaction. David and Holly are married.

¹ Because they share common surnames, we will refer to the Phans by their first name. We do this solely for purposes of clarity and not out of any disrespect for the Phans.

David and one of the sellers, Hanh, are brothers. Defendants, Di and Hahn failed to disclose or misrepresented numerous materially known defective conditions including the building's actual age. In 2008, the building was flooded due to drainage problems and roof leaks. Plaintiff also learned that the building was in a Community Redevelopment Agency designated area, which impeded its use and marketability.

B. The Arbitration Motion

On April 22, 2011, plaintiff moved to compel defendants to arbitrate the controversy pursuant to Code of Civil Procedure² section 1281.2. In support of the motion to compel arbitration, plaintiff attached the purchase agreement. Paragraph 22 of the purchase agreement contains dispute resolution provisions including one for binding arbitration. Paragraph 22(A) of the arbitration provides pertinent part:

“A. **MEDIATION:** Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action. [Paragraph 22(B)(3) below applies] to mediation whether or not the Arbitration provision is initialed. . . . THIS MEDIATION PROVISION APPLIES WHETHER OR NOT THE ARBITRATION PROVISION IS INITIALED.”

Paragraph 22(B) of the purchase agreement states: “B. **ARBITRATION OF DISPUTES:** (1) Buyer and Seller agree that any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation, shall be decided by neutral, binding arbitration, including and subject to [paragraph 22(B)(3)] below. . . . [¶] [¶] (3) **BROKERS:** Buyer and Seller agree to . . . arbitrate disputes or claims involving either or both Brokers, consistent with paragraphs 22 A and B, provided either or both Brokers shall have agreed to such . . . arbitration prior to, or within a reasonable time after, the dispute or claim is

² All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

presented to Brokers. Any election by either or both Brokers to participate in . . . arbitration shall not result in Brokers being deemed parties to the Agreement. . . .” Immediately following this provision is a bold and capitalized warning: ““NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE “ARBITRATION OF DISPUTES” PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE “ARBITRATION OF DISPUTES” PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.’ [¶] ‘WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE ‘ARBITRATION OF DISPUTES PROVISION TO NEUTRAL ARBITRATION.’”

Plaintiff’s managing partner, Michael Kolker, and the two sellers, Di and Hahn, initialed the arbitration and notice provisions. Defendants did not sign or initial either the arbitration or notice provision. Mr. Kolker filed a declaration which stated defendants refused plaintiff’s written mediation and arbitration demands.

Plaintiff argued the arbitration should be ordered because: the disputes are related to the terms and conditions of a contract requiring disputes be arbitrated; defendants are plaintiff’s agents; and arbitrating the dispute eliminates the possibility of conflicting rulings on common issues of law or fact. Among other authorities, plaintiff contended that *Nguyen v. Tran* (2007) 157 Cal.App.4th 1032, 1034-1035, supported its argument that defendants could be compelled to arbitrate. This is because an agent of a signatory

can be compelled to arbitrate. Further, plaintiff argued defendants were equitably estopped from refusing to arbitrate. And, plaintiff argued no exception to arbitration existed under section 1281.2, subdivisions (a) through (c). Finally, plaintiff argued that issues in the current action and the arbitration involving Di and Hahn, the sellers, were related such that a stay was mandatory under section 1281.4.

On May 16, 2011, defendants answered the complaint and moved to strike an attorney fee request. Defendants opposed the motion to compel arbitration. Defendants argued: they were not bound by the arbitration agreement between plaintiff and Di and Han; rather, the arbitration agreement specifically states the brokers were not parties to the buyer/seller agreement; they did not execute the agreement or initial the arbitration provision; and the authorities cited by plaintiff were either distinguishable or supported the argument the arbitration agreement was unenforceable. Defendants asserted that section 1281.4 was inapplicable to this case because arbitration was ordered in a separate action.

The trial court denied the motion to compel arbitration because: the arbitration agreement specifically required defendants to arbitrate only if they agreed; plaintiff produced no evidence defendants agreed to arbitrate the dispute; and the arbitration provision's express language precluded compelling defendants to arbitrate because they were plaintiff's agents. The trial court orally denied plaintiff's stay request. This timely appeal followed.

III. DISCUSSION

A. Arbitration Standards

Section 1281.2 allows a party asserting there is a written agreement to arbitrate a controversy to compel arbitration. Section 1281.2 requires the trial court to compel arbitration upon determination of a written agreement to arbitrate a controversy exists. The order compelling arbitration is subject to statutory exceptions for waiver, revocation, and a pending action. (§ 1281.2, subd. (a)-(c).) However, arbitration is a contractual

matter; therefore, a party, who has not agreed to arbitrate a controversy, cannot be compelled to do so. (*Hotels Nevada v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 347; *Crowley Maritime Corp. v. Boston Old Colony Ins. Co.* (2008) 158 Cal.App.4th 1061, 1069.) There, there is no public policy favoring arbitration of disputes which parties have not agreed to arbitrate. (*Freeman v. State Farm Mut. Auto Ins. Co.* (1975) 14 Cal.3d 473, 481; *Villacreses v. Molinari* (2005) 132 Cal.App.4th 1223, 1230; *Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.) Before a claim may be arbitrated, the petitioning party has the burden of proving the existence of a valid arbitration clause and the dispute is covered by the agreement. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972; *Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 413-414.) If that burden is sustained, the party opposing arbitration must prove by a preponderance of the evidence any defense to the duty to arbitrate. (*Engalla v. Permanente Medical Group, Inc.*, *supra*, 15 Cal.4th at p. 972; *Rosenthal v. Great Western Financial Securities Corp.*, *supra*, 14 Cal.4th at p. 413.) Because the matter was decided without conflicting evidence, the parties agree that the trial court's refusal to compel arbitration is subject to de novo review. (*Omar v. Ralphs Grocery Co.* (2004) 118 Cal.App.4th 955, 959; *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174.)

B. The Order Denying Arbitration

The issue here is whether defendants, the brokers, who did not sign an arbitration agreement, can be compelled to arbitrate claims by plaintiff, the buyer. A petition to compel arbitration is merely a suit in equity for specific performance of a contract. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 787; see also *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 17.) Ordinary contract principles apply and in interpreting arbitration provisions, we give effect to the parties' mutual intent. (See Civ. Code, § 1636; *Jones v. Jacobson*, *supra*, 195 Cal.App.4th at p. 17.) Absent some special or technical use, the clear and explicit meaning of contractual provisions (interpreted in an

ordinary and popular sense) controls judicial interpretation. (Civ. Code, § 1644; *TRB Investments, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 27; *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 744.)

The arbitration provision clearly and unequivocally excludes brokers from the duty to arbitrate. The arbitration provision also states that brokers are not parties to the agreement. There is no evidence defendants ever consented to arbitrate anything in writing. Thus, the trial court correctly refused to compel arbitration of the claims against defendants.

C. Plaintiff's Contentions

Plaintiff contends the arbitration provision is enforceable under several different theories. First, plaintiff argues equitable and agency principles allow it as a principal to impose the duty to arbitrate on its agents. The relationship between a broker and the client is one of agency. (*Smith v. Home Loan Funding, Inc.* (2011) 192 Cal. App.4th 1331, 1335; *Nguyen v. Tran, supra*, 157 Cal.App.4th at p. 1038.) And, plaintiffs are correct two exceptions exist to not compelling nonsignatories to arbitrate. (*Nguyen v. Tran, supra*, 157 Cal.App.4th at pp. 1036-1037; *NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 76.) One circumstance arises when the nonsignatory is a third party beneficiary of the contract which contains the arbitration provision. (*Crowley Maritime Corp., supra*, 158 Cal.App.4th at pp. 1069-1070; *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 242-243.) The second occurs when there is a preexisting relationship between the nonsignatory and a party to the arbitration agreement. (*Crowley Maritime Corp., supra*, 158 Cal.App.4th at p. 1069-1070; *County of Contra Costa v. Kaiser Foundation Health Plan, Inc., supra*, 47 Cal.App.4th at pp. 242-243.) The rationale for this exception is that the nonsignatory is equitably bound to arbitrate the claim. (*Matthau v. Superior Court* (2007) 151 Cal.App.4th 593, 599-600; *County of Contra Costa v. Kaiser Foundation Health Plan, Inc., supra*, 47 Cal.App.4th at pp. 242-243.)

The claim here is defendants are equitably bound as plaintiff's agents to arbitrate the dispute. Plaintiff relies heavily on language in *Nguyen v. Tran, supra*, 157 Cal.App.4th at pages 1034-1035 to support this contention. *Nguyen* does provide some guidance on the issue of the different parties' rights in a real estate transaction to compel arbitration. In *Nguyen*, the purchasers sued: the sellers; the purchasers' brokers; and the sellers' brokers. (*Id.* at pp. 1034-1035.) The purchasers' brokers sought to enforce an arbitration provision against the purchasers (signatories) and the sellers' brokers (nonsignatories). (*Ibid.*) The arbitration provision contained language similar to the language in this case. (*Id.* at p. 1035.) That is, the brokers had the right to elect to participate in the arbitration. (*Ibid.*) And, spaces were left for the purchasers and sellers to initial the arbitration provisions but none were left for the brokers. (*Ibid.*) No brokers initialed or consented to the arbitration provision. (*Ibid.*)

Nguyen concluded that the nonsignatory purchasers' brokers were entitled to enforce the arbitration provision against the purchasers. (*Nguyen v. Tran, supra*, 157 Cal.App.4th at pp. 1036-1038.) The appellate court then added: "Here the purchase agreement lists [purchasers'] brokers as the agents of [purchasers], who signed the purchase agreement. As such, [purchasers'] brokers could have been compelled to arbitrate the claims against them although they did not sign the agreement and were not parties to it." (*Id.* at p. 1037.) This statement was not supported by any authority. And, the issue in the case was not whether the purchasers' brokers could be compelled to arbitrate. Rather, the purchasers' brokers were demanding arbitration. (*Id.* at pp. 1036-1038.)

Nguyen then concluded the nonsignatory purchasers' brokers could not compel arbitration against nonsignatory sellers' brokers. (*Nguyen v. Tran, supra*, 157 Cal.App.4th at pp. 1038-1039.) The Court of Appeal explained: "The record contains no arbitration agreement between sellers and listing brokers, buyers and [sellers'] brokers, or [sellers'] brokers and [purchasers'] brokers. The arbitration provision in the purchase agreement is a contract between buyers and sellers, not one by [sellers'] brokers or [purchasers'] brokers. And although sellers and buyers agreed to arbitrate disputes

between them and the brokers, if either or both brokers agreed, [sellers'] brokers never consented to arbitrate anything. Thus, there is no evidence of an agreement to arbitrate by [sellers'] brokers." (*Id.* 1038.) And, the Court of Appeal held agency rules did not allow nonsignatories to compel each other to arbitrate based on a contract between and signed only by the principals. (*Id.* at p. 1039.)

The issue in *Nguyen* was whether the nonsignatory purchasers' brokers could compel the buyers as well as the sellers' brokers to arbitrate. (*Nguyen v. Tran, supra*, 157 Cal.App.4th at pp. 1036-1039.) Thus, *Nguyen* is not precisely on point here where a signatory purchaser (principal) is seeking to compel nonsignatory brokers (agents) to arbitration. No doubt, *Nguyen* in *dictum* stated the principal in that case could have compelled the broker to arbitration. (*Id.* at p. 1038.) However, it is unclear on what basis the statement was made. Presumably, it was based on the fact that the nonsignatory brokers in that case had already consented to arbitration. By contrast, no authority was cited which requires a nonsignatory to arbitrate in the face of the contract's plain language coupled with the defendants' fervent refusal to do so. Rather, defendants are correct that *Nguyen* is more persuasive in its conclusion the nonsignatory brokers could not be compelled to arbitrate based on their status as the principal's agents. (*Id.* at p. 1039.)

Second, plaintiff asserts the arbitration agreement is ambiguous and unconscionably allows brokers to submit at their discretion. Plaintiff's contention is predicated on the theory that the unconscionable provision can be enforced against a party, which has exempted itself from arbitration. Assuming the clause was found to be unconscionable, the authorities cited by plaintiff do not hold that courts will compel parties to arbitration because a contract is one-sided. (See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113-127 [the arbitration statutes do not permit a court to reform an unconscionably one-sided agreement]; *Kinney v. United Healthcare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1325 [terms of arbitration agreement so unconscionable as to preclude its enforcement]; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1552 [provision of arbitration agreements unduly

advantageous to one side is unenforceable in its entirety].) More to the point, the issue in this case (whether a nonsignatory can be compelled to arbitrate) was not addressed in these cases. Because defendants never agreed to arbitrate the dispute, the cases cited by plaintiff concerning the enforcement of unconscionable agreements have no bearing on this issue.

Third, according to plaintiff, the arbitration provision can be reformed and enforced by striking the unconscionable portion pursuant to Civil Code section 1670.5, subdivision (a).³ Plaintiff contends the trial court should have severed the following italicized words from paragraph 22(b)(3), “Buyer and seller agree to mediate and arbitrate disputes or claims involving either or both Brokers, consistent with 22A and B, *provided either or both Brokers shall have agreed to such mediation or arbitration prior to, or within a reasonable time after, the dispute or claims is presented to Brokers.*” While Civil Code section 1670.5, subdivision (a) allows severance of unconscionable provisions, it does not permit a trial court to compel a nonsignatory to arbitrate a dispute. Civil Code section 1670.5, subdivision (a) has no application to this case. Furthermore, defendants are not seeking to enforce an unconscionable contract. Rather, a signatory is seeking to have the trial court reform the contract to require nonsignatories to participate in arbitration contrary to express contractual terms.

Fourth, plaintiff asserts that equity demands reciprocity between the buyer, who gave up its right to a jury trial, and defendants, the brokers. Although defendants may have benefited from the purchase agreement, they were not parties to the contract. Furthermore, defendants have not sought the protection of the arbitration provision but have resisted it. In such cases, the Court of Appeal has concluded: “The fact that a nonsignatory to a contract may in some circumstances be viewed as a third party

³ Civil Code section 1670.5, subdivision (a) states, “If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”

beneficiary or an agent who is entitled to *compel* arbitration [citation] is legally irrelevant where, as here, *[the nonsignatory] is not the one who wants to be bound by the arbitration provision in a contract that he signed only in a representative capacity.* [Citations.] [¶] It is one thing to permit a nonsignatory to relinquish his right to a jury trial, but quite another to compel him to do so.” (*Benasra v. Marciano* (2001) 92 Cal.App.4th 987, 991; see also *Crowley v. Maritime Corp. v. Boston Old Colony Ins. Co.*, *supra*, 158 Cal.App.4th at pp. 1071-1072.) This is not a case where a nonsignatory has sought the protection of an arbitration provision. In any event, equitable principles do not require enforcement of an arbitration provision they did not sign and were specifically excluded from at their discretion.

D. The Refusal To Stay The Action

Citing section 1281.4, plaintiff asserts that the action should have been stayed pending the outcome of the arbitration between it, Di and Hahn. Section 1281.4 provides in part: “If an application has been made to a court of competent jurisdiction, whether in this State or not, for an order to arbitrate a controversy which is an issue involved in an action or proceeding pending before a court of this State and . . . if arbitration of such controversy is ordered, until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies. [¶] If the issue which is the controversy subject to arbitration is severable, the stay may be with respect to that issue only.” Section 1281.4 is designed to promote expeditious and efficient settlement of claims as well as to avoid multiple actions. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 714-715; *Federal Ins. Co. v. Superior Court* (1998) 60 Cal.App.4th 1370, 1374-1375; *Marcus v. Superior Court* (1977) 75 Cal.App.3d 204, 211-212.) As one appellate court in *Federal Ins. Co. v. Superior Court*, *supra*, 60 Cal.App.4th at page 1374 explained, “The purpose of the statutory stay is to protect the jurisdiction of the arbitrator by preserving the status quo until arbitration is resolved.” (Accord, *Heritage Provider Network, Inc. v. Superior Court* (2008) 158 Cal.App.4th 1146, 1152-1153.) *Federal Ins.*

Co. v. Superior Court, *supra*, 60 Cal.App.4th at page 1375 further explained: “In the absence of a stay, the continuation of the proceedings in the trial court disrupts the arbitration proceedings and can render them ineffective.” (*Ibid.*; see also *MKJA v. 123 Fit Franchising, LLC* (2011) 191 Cal.App.4th 643, 658.) Whether section 1281.4 applies to this case involves a question of statutory interpretation requiring de novo review. (*MKJA, Inc. v. 123 Fit Franchising, LLC*, *supra*, 191 Cal.App.4th at p. 657; *Cardiff Equities, Inc. v. Superior Court* (2008) 166 Cal.App.4th 1541, 1548.)

Section 1281.4 *requires* the pending action to be stayed when there is an order to arbitrate a controversy and the dispute also involves the same issues in the judicial proceeding. (*Thomas v. Westlake* (Mar. 23, 2012, D058531) ____ Cal.App.4th [2012 Cal.App. LEXIS 339, *31]; *Heritage Provider Network, Inc. v. Superior Court*, *supra*, 158 Cal.App.4th at p. 1153; *Marcus v. Superior Court*, *supra*, 75 Cal.App.3d at p. 209.) Even a single overlapping issue establishes the requirement for imposition of a stay under section 1281.4 pending the arbitration proceeding when requested upon proper motion. (*Heritage Provider Network, Inc. v. Superior Court*, *supra*, 158 Cal.App.4th at p. 1153; *Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1796; see also § 1281.4 & 1292.8.) Here, plaintiff established the criteria of an arbitration order and overlapping issues. The stay could prevent the duplication of litigable issues. (See *Marcus v. Superior Court*, *supra*, 75 Cal.App.3d at pp. 211-212.) A finding that the sellers are not liable for fraud in the arbitration will limit issues subject to determination in this lawsuit between the buyers and the brokers. For example, a finding by the arbitrator that there was no fraud by negligent or intentional misrepresentation could bind plaintiff in the present case against defendants, the brokers. If there is a finding no tort was committed in the commercial transaction, a stay could potentially simplify the pending judicial proceeding. Plaintiff is correct that section 1281.4 applied. Therefore, the trial court should have granted plaintiff’s stay request under section 1281.4. To the extent defendants are claiming an exercise of discretion under section 1281.4 was warranted, a trial court does have the discretion to sever or limit the stay. (See *Federal Ins. Co. v. Superior Court*, *supra*, 60 Cal.App.4th at p. 1375; see also *Cruz v. PacifiCare*

Health Systems, Inc. (2003) 30 Cal.4th 303, 320.) We need not address the parties' other stay arguments.

IV. DISPOSITION

The order denying the stay request is reversed. The order denying the motion to compel arbitration is affirmed. Each side shall bear their own costs on appeal.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

MOSK, J.